IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Recursion Software, Inc.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	Civil Action No. 4:10-cv-403
Double-Take Software, Inc.,	§	
f/k/a NSI Software, Inc. and	§	Jury
Network Specialists, Inc.	§	
	§	
Defendant.	§	

AGREED CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER

WHEREAS all parties of record, by their counsel, as evidenced from their respective signatures below, desire to enter into an agreement pursuant to Federal Rule of Civil Procedure 26 relating to the confidentiality of documents and other information (collectively "Information") that may be disclosed, produced, or submitted in connection with this action:

NOW, THEREFORE, the parties agree as follows:

1. This Agreed Confidentiality Agreement and Protective Order ("Order") governs all Information disclosed, produced, or submitted by any party to any other party in connection with this action and designated by the producing party as "Confidential." All Information designated as "Confidential" or "Confidential – Attorneys' Eyes Only" ("Confidential Information") may only be used for purposes of this litigation, and disclosure is limited as indicated below.

2. This Order is entered for purposes of this action and shall remain in full force and effect unless modified by an Order of the Court or by the written stipulation of the parties filed with the Court. This Order will not be used in any manner or form, directly or indirectly, as

evidence in any trial or any hearing to support the proposition that any party concedes that any Information is proprietary or confidential. This Order may be used and referenced at any hearing which involves issues related to the enforcement of any provision of this Order.

3. "Confidential Information" shall mean all Information designated as "Confidential" or "Confidential – Attorneys' Eyes Only" as provided in this Order, which is produced or otherwise disclosed in connection with this action, including, but not limited to, the following materials or portions thereof so designated: (a) all documents and things and copies thereof; (b) written discovery requests and responses thereto; (c) all testimony given in this action by witnesses, whether by deposition, at any hearing, or at trial, including all transcripts thereof; and (d) all other Information produced or disclosed in response to the parties' initial, informal exchange of Information. "Confidential Information" includes confidential business, technical, or financial Information or other data or material a party considers as confidential or private.

4. Confidential Information in documentary or written form shall be designated as "Confidential" by marking each page of the document or writing containing Confidential Information as "CONFIDENTIAL" or by written notice to all parties receiving the documents or written materials identifying which portions thereof are designated as "Confidential." If marked on a document, this designation shall be plainly legible on each page of each document, and may be made on the original document or copies thereof that are produced or exchanged.

5. Information designated as "Confidential" may not be disclosed to any person other than the following:

(a) Counsel of record for the parties in the above-captioned action, including in-house counsel and other litigation counsel engaged in assisting counsel of record on this case and their secretaries, paralegals, or other support personnel involved in this litigation;

(b) Up to six officers, directors, or employees of each party who need to have the Information disclosed to them in order to assist in evaluating and prosecuting or defending this litigation;

(c) Outside experts, consultants, and litigation support personnel working with counsel of record;

(d) Witnesses at a deposition;

(e) Witnesses at trial;

(f) The Court, its staff, and jurors selected in this action including all appellate courts;

(g) An author or recipient (including copied and blind carbon copied recipients) of the original Information; and

(h) Mediators and/or Facilitators mediating or facilitating a resolution of this action.

6. Information shall not be considered Confidential Information if it: (i) is public knowledge; (ii) becomes public knowledge other than through disclosure in violation of this Order or through violation of another confidentiality agreement or representation; or (iii) is approved for release by authorization of the provider of the Information, but only to the extent of the authorization.

7. The parties may, by further agreement, or by further order of the Court, make this Order more restrictive or less restrictive as to particular Information than as provided herein.

8. In the event that any party wishes to provide Confidential Information to a third party, other than those qualified individuals defined in paragraph 5, the disclosing party shall, at least ten (10) days prior to the proposed disclosure, serve (such service to be complete upon receipt) upon all other counsel of record a written notice specifying: (a) the name, address, business or professional affiliation, and title or position of such person; and (b) the particular items of Confidential Information which the party proposes to disclose. If an objection to such disclosure is served by any party within fourteen (14) days (such service to be complete upon

receipt), no such disclosure shall be made by the disclosing party unless and until authorized by the Court.

9. Each person to whom Confidential Information is to be made available, except for the persons identified in sections 5(a), (b), (e), (f), (g), and (h) shall first acknowledge in writing that they have reviewed the terms of this Order and are subject to the jurisdiction of this Court in enforcing this Order, by executing the form Nondisclosure Agreement attached hereto as **Exhibit "A."**

10. All persons to whom Confidential Information is disclosed pursuant to this Order shall:

(a) Be responsible for keeping such custody and control over such Confidential Information so as to assure that it is not lost, misplaced, or inadvertently disclosed in violation of this Order;

(b) Not reveal the contents of the Confidential Information to any person not subject to the terms of this Order; and,

(c) Not reveal or use the contents of the Confidential Information except for the purposes set forth in this Order.

11. In the event any person bound by this Protective Order receives a subpoena or request for Confidential Information from any third party or from any governmental or regulatory authority, the person receiving such subpoena or request shall notify the owner of the Confidential Information within ten days, and the owner of the Confidential Information shall advise the person subject to the request or subpoena of any objections to disclosure. If the owner of the Confidential Information objects to the disclosure of Confidential Information, the owner shall file a motion for protective order with the appropriate court or agency to protect disclosure of the Confidential Information, and the person receiving the subpoena or request, having given proper notice of same under this paragraph, shall not have any liability for complying with any such subpoena or request.

12. Confidential Information may be further designated by a party as "Confidential – Attorneys' Eyes Only" by marking such Information "CONFIDENTIAL – ATTORNEYS' EYES ONLY" or by written notice to all parties receiving the documents or written materials identifying which portions thereof are designated as "Confidential – Attorneys' Eyes Only." If marked on a document, this designation shall be plainly legible on each page of each document, and may be made on the original document or copies thereof that are produced or exchanged. All documents or things designated as "Confidential – Attorneys' Eyes Only" are included within the meaning of Confidential Information as used in this Order, and all provisions of this Order apply to such Information, except as indicated below. Any such Information includes source code, source code documentation and the most sensitive business, technical, financial, or otherwise private Information of a party of which direct disclosure to the opposing party could result in prejudice or harm. Source code and source code documentation produced in this case – and all copies thereof – shall be maintained in a locked room or file cabinet at (1) the offices of outside counsel or (2) the offices of any expert or consultant entitled to have access to Confidential Information under paragraph 5(c). Subject to the provisions of this Order, a party who receives Information designated as "Confidential – Attorneys' Eyes Only" shall only give, show, disclose, make available, or communicate the Information to the persons identified in sections 5(a), (c), (d), (e), (f), (g), and (h).

13. No person, firm, corporation, or other entity shall use Confidential Information received from another party in any manner whatsoever except for discovery, motion practice, or in connection with other pre-trial proceedings, preparation for trial, trial, and any appeal of this action. Furthermore, no person, firm, corporation, or other entity subject to this Order shall give, show, disclose, make available, or communicate Confidential Information received from another party to any person, firm, corporation, or other entity not expressly authorized by this Order to

receive such Confidential Information except as provided in paragraph 11.

14. Whenever Confidential Information is disclosed in a deposition to a non-party witness, the party making such disclosure shall inform the witness, on the record, that the use of such Information is subject to the terms of this Order. To the extent the witness is any person other than a current employee of a party to this litigation, the witness must sign the form Nondisclosure Agreement attached as **Exhibit "A,"** which shall be included as an Exhibit to such deposition, or the witness shall agree on the record to be bound by the terms of this Order and the terms of the form Nondisclosure Agreement attached as **Exhibit "A."** If a witness refuses both options, the deposition may cease and the parties should file any necessary motions with the Court and set them for hearing, or the parties may agree to continue the deposition on terms agreeable to all parties. If any person present at the deposition is not encompassed within the categories of persons defined in paragraph 5 of this Order permitted to have access to the category of Information being disclosed, that person may be required to leave the deposition while any such Confidential Information is being disclosed during the deposition.

15. All Confidential Information shall be filed under seal pursuant to Local Rule CV-5(a)(7). This Order constitutes a motion and order permitting such Information to be filed under seal.

16. Any transcripts of a deposition, hearing, or other proceeding, or any portion thereof, including exhibits, may also be designated as Confidential Information by having counsel for a party designate on the record prior to such disclosure or at any time before the deposition, hearing, or other proceeding is adjourned, or within 20 days following receipt of the transcript of such testimony that such testimony is "Confidential" or "Confidential – Attorneys' Eyes Only." The transcript or portion thereof so designated shall be subject to this Order from and after the date of the designation as "Confidential" or "Confidential – Attorneys' Eyes Only."

In such situations, the question(s) and answer(s) designated by counsel as pertaining to Confidential Information, at the option of the designating party, may be transcribed separately from the remainder of the deposition, hearing, or other proceeding.

17. Counsel for any party may exclude from the room during a deposition, hearing, or other proceeding, any person (other than the witness who is then testifying) who is not entitled under this Order to receive the particular Confidential Information. However, under no circumstances shall a party (including for corporate parties, their representative at trial) be required to be absent during any portion of the trial of this cause.

18. If any party objects to the designation of any material as Confidential Information or to the level of such designation, the party shall state the objection by letter to counsel for the party making the designation. If the parties are then unable to resolve the objection, the party making the objections shall have fourteen (14) days from the date such written notice is sent within which to move the Court for a judicial determination as to whether the Information was properly designated. Until the Court rules on any such motion, the Information marked as Confidential Information shall continue to be deemed to have the designation of the party who made the designation under the terms of this Order. If the party making the objection does not file such a motion within the aforementioned fourteen (14) day period, any objection will be waived, and the Information identified in the written notice shall keep its designation and remain subject to protection under this Order.

19. The procedure set forth herein shall not affect the rights of the parties to object to discovery on any grounds, nor shall it relieve a party of the necessity of proper response or objection to discovery requests, nor shall it limit or preclude any party from seeking further relief or protective orders from the Court as may be appropriate under the Federal Rules of Civil

Procedure or from applying to the Court for relief from this Order. Nor shall this Order affect: (i) the status of any Information as a trade secret or as any other type of confidential or proprietary Information; (ii) any party's right to use the Information that it designates as Confidential Information in its sole and complete discretion; or (iii) any party's right in any proceeding to object to the admission of any evidence on any ground.

19. Within sixty (60) days after the conclusion of this action, including appeals, all documents designated by the other party as containing Confidential Information under the terms of this Order shall be destroyed or delivered to counsel for the designating party, unless otherwise agreed to in writing. Provided, however, that the law firms representing the parties as trial counsel in this cause shall not be obligated to remove any documents, summaries, memoranda, attorney-work product, or pleadings from their files; to remove, delete or alter any electronic databases; or to alter any "back-up tapes" or other electronic copies of data maintained by the law firms for use to retrieve electronic data, including those maintained for the purpose of a computer system failure or other loss of data. 20. The inadvertent or unintentional production or disclosure of materials containing confidential or secret Information without being designated as Confidential Information at the time of the production or disclosure shall not be deemed waiver in whole or in part of a party's claim of confidentiality or secrecy, either as to the specific materials produced or as to any other materials relating thereto or on the same related subject matter. Materials containing confidential or secret information inadvertently or unintentionally produced without being designated as Confidential Information may be retroactively designated by notice in writing of the designated class of each document by Bates number, and for other materials by identifying the materials at issue, and the documents or materials shall be treated appropriately from the date written notice of the designation is received by the other party. To the extent that, prior to such notice, a party receiving the Information may have disclosed it to

persons other than those persons allowed to view such materials pursuant to this Order, the party shall not be deemed to have violated this Order, but the party shall make reasonable efforts to retrieve the Information promptly from such person and to limit any further disclosure pursuant to this Order.

21. The designation of a document as "Confidential," "Confidential – Attorneys' Eyes Only," or any lack of objection to such designation will not be used in any manner to infer any admission as to the parties' position as to the merits of the case.

22. Nothing herein shall be construed to in any way prevent the use of Confidential Information at any mediation, facilitation, pre-trial hearing, trial, or in preparing for trial or any appeal.

23. Nothing in this Order precludes a party's counsel from generally describing Confidential Information to his or her client or advising the client about the case, including issues related to settlement.

24. Any third party from whom discovery is sought in this lawsuit may produce or disclose Information subject to the provisions of this Order and designate Information as "Confidential" or "Confidential – Attorneys' Eyes Only."

25. The confidentiality obligations of this Order shall continue while the district court, or any appellate court, has jurisdiction over this matter, and shall survive the conclusion of this action for the purpose of returning or destroying Confidential Information, unless modified by further order of the Court.

SIGNED this 23rd day of November, 2010.

AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE

AGREED AND APPROVED:

/s/ David H. Harper
David H. Harper
Lead Attorney
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Michelle C. Jacobs
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ATTORNEYS FOR DEFENDANT
DOUBLE-TAKE SOFTWARE, INC.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Recursion Software, Inc.,	§	
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Plaintiff,	§	
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v.	§	
	§	Civil Action No. 4:10-cv-403
Double-Take Software, Inc.,	§	
f/k/a NSI Software, Inc. and	§	Jury
Network Specialists, Inc.	§	
	§	
Defendant.	§	

NONDISCLOSURE AGREEMENT

I hereby acknowledge that I have read the Confidentiality Agreement and Protective Order ("Order") entered in the above-referenced cause, and I acknowledge and declare that I understand the terms thereof, and that I agree to be bound by the terms thereof. I further agree that I will not at any time use or disclose "Confidential Information," as that term is defined in the Order, received by me in the course of this lawsuit that is subject to the Order except for purposes of this lawsuit or as may be required by the Court or counsel for a party to this lawsuit.

Dated: ______________________

____
[Print Full Name]

____
[Signature]